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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 626

OTIS SEARS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Otis Sears, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 2, 1957.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the Appendix to this petition. It is likewise set forth in full in the certified copy of the record filed in this Court. The judgment of the United States Court of Appeals likewise appears in said certified copy, along with the order deny-

ing the petition for re-hearing. Said opinion has not as yet been reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirmed a judgment entered by the United States District Court for the Northern District of Illinois, Eastern Division.

The District Judge rendered an informal oral opinion which is set forth in full in the Appendix to this petition; and which is likewise found on pages 50 and 51 of the aforesaid certified copy of the United States Court of Appeals' record.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered October 2, 1957. Petition for re-hearing was denied October 31, 1957. The order denying the petition for re-hearing is shown at page 1a of the Appendix to this petition. This petition is filed within 30 days after the denial of the petition for re-hearing.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1) and rule 19 Section 1 B of the rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals had the power to reject the findings of the trial court which were favorable to the defendant on the question of the alibi, substitute its own judgment therefor in order to rule against the defendant, and still say that a Court of Appeals is bound by the findings of the court below, and all the while it is rejecting those findings of the court below which were favorable to the defendant.

2. Whether or not the Court of Appeals was bound to accept the findings favorable to the defendant on the question of the alibi.

3. Whether or not the evidence in this case was sufficient to sustain a finding of guilty; particularly so where (1), the defendant according to the trial court established an alibi placing him away from the scene where the marked money was gotten rid of; and (2), where an informer has been permitted to leave the presence and view of police officials with opportunity to deal with unknown persons out of the sight and hearing of said police officers.

STATEMENT OF THE CASE.

The indictment in this case was in three counts. The first count alleged that on or about November 15, 1952, in Chicago, Sears unlawfully purchased from unknown persons, and had in his possession, 60 grains of heroin, not in nor from the original stamped package. The second count charged that at the same time and place, Sears unlawfully sold to Caldwell for $50.00, 60 grains of heroin without a written order on forms issued by the Secretary of Treasury. The third count charged that at the same time and place, Sears fraudulently and knowingly received, concealed, bought and facilitated the transportation and concealment after importation of 60 grains of heroin, knowing the same to be unlawfully imported.

The petitioner pleaded not guilty; was tried and found guilty by the Court, and sentenced to five years in custody of the Attorney General and fined $1.00. Appropriate motions for judgment of acquittal, for new trial, and to vacate the judgment were properly made but overruled.

The government's evidence was that one Caldwell was arrested on November 14, 1952 by narcotics officers. Some time later at the police station he was searched (to make him an informer) and found to have nothing on him. He was then given $50.00 in marked money, whereupon he went with the officers to a record shop at 47th Street. He was in the record shop and out of the sight and hearing of the officers for ten minutes or thereabouts. The officers could not and did not know what went on in the record shop. Caldwell returned to the officers, and was searched again and nothing was found on him. The gist of the government's contention is that Caldwell gave Sears the $50.00 in the record shop, although the trial judge found that Sears had successfully established his alibi that he was not then in the record shop.

The officers then took Caldwell in an automobile to 46th and Michigan where he alighted and proceeded a block east to 46th and Indiana. The officers drove around the block and took up a position a few hundred feet away from Caldwell who was standing on the corner. The agents could not and did not know what Caldwell did or with whom he met or dealt while they were driving speedily around the block. After a wait of some fifteen minutes or thereabouts, the officers noticed the defendant, Sears, walking in a normal manner towards Caldwell and Caldwell started walking toward Sears. When they were abreast of each other the hands of the men met for a moment. The officers immediately alighted from the car and arrested them. Caldwell had on him a powdery white substance in a little brown envelope, and Sears had the $50.00 in marked money. Not over thirty minutes could have elapsed from the time Caldwell and the officers left the record shop until the arrest.

The defendant's evidence was that Sears was playing cards in a building at 4544 Indiana Avenue for a period

of about an hour before the arrest. This testimony was corroborated by a witness named Carbin, a postal employee working for the United States Government. The defense evidence further was that Sears' clerk in the record shop telephoned him at the card game and said Caldwell was in the record shop to pay Sears some money. The evidence was that Caldwell owed Sears seventy odd dollars. Sears told the clerk in the record shop to tell Caldwell to leave the money there. Caldwell stated that he would have to give the money to Sears in person. Sears told the clerk to tell Caldwell to meet him, Sears, on the corner. They met on the corner; Caldwell gave Sears $50.00 and said he would pay the balance later but was in a hurry then. Sears was counting the money in plain view as the officers were arresting him. He denied selling Caldwell any narcotics.

In an informal oral opinion, at the conclusion of the case, the trial judge said, among other things:

> "The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out."

The Court of Appeals affirmed the judgment, but in doing so it adopted a most unusual course. The Court of Appeals' opinion started out by citing numerous cases which correctly hold that a court of review cannot try the issues of fact de novo. However, it then promptly proceeds to retry, de novo, the question of the petitioner's alibi. The trial court had found that the petitioner's alibi was established. Instead of accepting this finding of fact, the Court of Appeals proceeded to try the ques-

tion de novo and concluded, de novo, that the defendant had not established his alibi.

In order to convict in the first instance and affirm the conviction on review, it was absolutely necessary to establish that Sears and Caldwell were in communication with each other twice on the day in question. Judge Perry found that they were only together once. Since they were only together once, then petitioner insists that the evidence is insufficient to prove him guilty beyond all reasonable doubt. It seems that the Court of Appeals must have realized this. However, instead of deciding the case on the basis of this contention, which must surely have resulted in the reversal of the conviction, the Court of Appeals proceeded to try the question of the alibi de novo; to find that Sears and Caldwell were together in the record shop (although Judge Perry found to the contrary), and then proceeded to affirm the conviction.

The Court of Appeals rejected the factual finding of the trial judge that Sears, during all the time in question, was playing cards. Then after rejecting this factual finding which was favorable to the defendant, the Court of Appeals proceeded to re-examine the evidence touching an alibi; to re-weigh the evidence; and to conclude that Sears' evidence fell far short of sustaining the alibi.

In doing this, the Court of Appeals went exactly contrary to the very first paragraph of its opinion which emphasized the legal proposition that issues of fact are not triable de novo by the Court of Appeals. The Court of Appeals says that it may not try an issue of fact de novo; yet it then promptly proceeds to do that very thing. But it is on a fact which was favorable to the defendant and which the defendant claims proves his innocence.

REASONS FOR GRANTING THE WRIT.

Certiorari is prayed for on two basic grounds, each of which will be fully developed hereinafter; towit:

1. A Court of Appeals has decided an important question of federal law which has not heretofore been settled by the Supreme Court and which should now be settled by this court.

2. The Court of Appeals has so far departed from accepted and usual judicial proceedings as to call for an exercise of this court's power of supervision.

I

A Court of Appeals has decided an important question of federal law which has not heretofore been settled by the Supreme Court and which should now be settled by this Court.

This is a case of first impression. Diligent research has failed to unearth any single case where a United States Court of Appeals has stated the law to be one way, and yet in the very self same opinion has proceeded to apply the law in a different way. Because painstaking research has failed to unearth such a case, we are unable to cite any authority for our contention. However, we earnestly contend that logic and reason sustain us.

As already stated, the opinion of the Circuit Court of Appeals cites case after case which supports the general rule that issues of fact may not be tried de novo in the reviewing court. The reviewing court must accept the findings of fact as enunciated by the lower court where there is any evidence to support them. The only thing that a reviewing court can do after accepting the lower court's facts, is to determine as a matter of law whether or not reasonable minds might differ as to whether in-

ferences other than guilt can be drawn from the evidence; and if all reasonable minds must be in agreement that reasonable hypotheses other than guilt can be drawn from the evidence, then the evidence is insufficient to support a judgment of guilty.

In the case at bar, the government would have to show that the informer, Caldwell, got rid of the marked $50.00 in the record shop by giving it to Sears there. This is a truism, because the agents swear that they searched Caldwell when he came out of the record shop and he did not have the marked money on him. Next, the government must prove that when Sears and Caldwell met on the corner of 46th and Indiana, Sears passed the narcotics to Caldwell. In regard to the first item, Judge Perry found that during all the time in question, Sears was on Indiana Avenue playing cards. This then is where the paradox comes in. Faced with this situation, the Court of Appeals must either dispose of the case by recognizing the fact as Judge Perry found it, that Sears was not in the record shop and therefore could not possibly have been the person to whom Caldwell gave the marked money; or it must reject the alibi. Surely, in such a situation, if Caldwell gave the marked money to some person other than Sears, then all reasonable minds would conclude that an inference other than guilt could be drawn from the evidence. It could reasonably be inferred, or rather it would have to be inferred, that Caldwell trafficked with some unknown person in the record shop and that this unknown person could easily have given him the narcotics. But here again a paradox exists; for Sears openly admits that he obtained the money from Caldwell when they met FOR THE FIRST TIME on 46th and Indiana at the conclusion of the hour long card game. Paradox number 3 appears when we try to reconcile

Judge Perry's finding that Sears, all the while, was playing cards on Indiana Avenue, with the evidence of the officers that Caldwell was searched when he left the record shop and did not have the money on him; that is, when we accept the fact that Sears and Caldwell met only once, then we ask who got the money in the record shop? Or should we go to paradox number 4, and reconcile the situation presented by saying that the search of Caldwell when he left the record shop was so superficial that it failed to reveal the marked money still hidden on him. If that be the fact, then such a superficial search would surely have failed to reveal hidden narcotics.

Instead of analyzing the evidence in the light of the above, and basing a decision thereon, the Court of Appeals proceeded to decide as a matter of federal law that it could accept those findings which pointed to the guilt of the defendant; and further decided as a matter of federal law that it could not re-examine the factual issues adverse to the defendant; and finally decided, as a matter of federal law that it could re-examine and re-weigh the evidence bearing on a factual matter favorable to the defendant and come to a wholly different conclusion than that reached in the trial court. That is, where the trial court's factual finding was favorable to the defendant, the Court of Appeals decided as a matter of federal law that it could re-weigh the evidence and accept as a fact a different conclusion unfavorable to the defendant. True, the court did not say this in so many words, but the inescapable conclusion is there nonetheless.

Defendant, Sears, urged the Court of Appeals in his petition for re-hearing to re-examine the case in the light of the fact that the Court of Appeals was bound to accept the alibi because Judge Perry accepted it. But

the Court of Appeals ignored the defendant's request and based its decision on the fact which it alone found that Sears' evidence fell short of sustaining his alibi.

II.

The Court of Appeals has so far departed from accepted and usual judicial proceedings as to call for an exercise of this court's power of supervision.

The accepted and usual judicial proceeding in a situation such as is here presented, is to accept all findings of fact as they come from the trial court, and this includes those facts both favorable to a litigant and unfavorable to him. The accepted and usual judicial proceeding then is to render an opinion and decision in accordance therewith. If the facts are such that, when ALL are considered and evaluated, reasonable minds are in agreement that reasonable hypotheses of innocence can be drawn therefrom then the reviewing court should reverse a judgment of conviction.

In the case at bar the defendant has not had the benefit of the judgment of the Court of Appeals based on Judge Perry's factual finding that all the while, Sears was playing cards on Indiana Avenue.

He is entitled to an examination of his case with that fact accepted by the Court of Appeals, and is entitled to a decision thereon. Because the Court of Appeals has so far departed from accepted and usual judicial proceedings, he has been deprived of a judgment in accordance with accepted federal law and accepted judicial proceedings. He should be speedily given that hearing; and therefore he prays that this Honorable Court will grant certiorari and render such decision as to the Court may seem meet.

CONCLUSION.

Because of the above, petitioner earnestly prays that the writ be granted.

Respectfully submitted,

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APPENDIX.

OPINION AND FINDING OF THE DISTRICT COURT

The Court: The Court has heard the testimony. The uncontradicted evidence is that one Caldwell was arrested, and he was searched. He was given some marked money, five $10 bills of marked money.

He was escorted by the police to a certain location where he was released. He went to a record shop. He was under surveillance there. He stayed a while, came out, and then the police escorted him to another point on the street, released him, two of them remained in the car, and he was under surveillance.

The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out.

Now, as to the contents of the telephone call, he states he received the call from a girl who worked in his office, and that Caldwell was there, that he would not give her the money but that he would give it to him, and a meeting was arranged.

He went out and met Caldwell on the street and got the money. (T. 357.)

Then comes contradiction or uncertainty in the evidence. However, the court is conclusively of the opinion that after the evidence which the officers introduced here, showing that they searched Caldwell immediately before releasing him and that he had no narcotics on him immediately prior to being released from custody, and that he had narcotics on him when he was apprehended immediately after he joined hands with Sears, and that

Sears had the marked money, which is not contradicted on him, which he said that Caldwell paid him for a debt —that does not impress the court.

The court is of the opinion that the marked money was delivered to Caldwell and the narcotics in question was delivered by the defendant Sears to Caldwell at the same time, and that there was a consummation of a transaction there, and that the defendant is guilty.

The defendant will come forward and we will dispose of the matter. (T. 358.)

The Court: You are committed to the custody of the Attorney General of the United States for a period of five years on the whole indictment, and the sentence is stayed for ten days. (T. 360.)

The Court: A mandatory fine. I don't know anything about the man's financial condition, but—

A fine of $1. Fines are not determinative matters in this type of case. $1 and a sentence of five years together on this case. (T. 361.)

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12019 September Term and Session, 1957

United States of America,
Plaintiff-Appellee,
v.
Otis Sears,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

October 2, 1957

Before Major, Lindley and Hastings, Circuit Judges.

Lindley, Circuit Judge. Defendant, having been found guilty of violation of the Federal narcotic laws in a trial by the District Judge, appeals from the conviction, urging that the record does not disclose substantial evidence to support the finding of guilt. Obviously, any attempt to determine such a question requires consideration of the evidence and a test of the credibility of the witnesses. With the latter we have nothing to do. Our only function is to determine whether the evidence most favorable to the finding adequately sustains it. *United States* v. *Marachowsky*, 201 F. 2d 518 (CA-7), cert. den., 345 U.S. 965; *United States* v. *Detente*, 199 F. 2d 286, 288 (CA-7); *United States* v. *Poppa*, 190 F. 2d 112, 114 (CA-7); *United States* v. *Chiarelli*, 192 F. 2d 528, 530 (CA-7); *United States* v. *Kadison*, 145 F. 2d 525, 526 (CA-7); *United States* v. *Feinberg*, 123 F. 2d 425, 426 (CA-7). We cannot try the issues of fact *de novo*, and we cannot set aside the trial court's finding, unless we can say, as a

matter of law, that the evidence most favorable to it is wholly insufficient to support a verdict of guilty beyond all reasonable doubt. *United States* v. *Holsman*, 238 F. 2d 141, 142 (CA-7); *United States* v. *Owen*, 231 F. 2d 831, 832 (CA-7); *United States* v. *New York Great A. & P. Tea Co.*, 173 F. 2d 79, 81 (CA-7).

Under the trial court's finding, one Caldwell, being in the custody of the United States narcotic agents, having been searched, was given $50.00 in marked currency bills; later, the officers, after Caldwell had made a telephone call, proceeded with him to defendant's shop. While the officers waited outside, Caldwell entered the building, returning to and rejoining the officers shortly later. He was again searched; the bills were no longer in his possession, and no narcotics were found on his person. The officers then proceeded to another point near at hand where they observed defendant Sears meet Caldwell, who had proceeded alone, and pass to him, from hand to hand, an object. They immediately arrested Sears, and found in his possession the bills they had given Caldwell, and, on Caldwell, narcotics contained in a brown envelope. Upon these findings, the court found Sears guilty.

The facts mentioned by the court were amply proved by the Government's evidence. The only reasonable conclusion from the record is that Caldwell purchased narcotics from Sears; that the drugs bore no stamp and were accompanied by no treasury order. Though defendant admitted that he received the marked money from Caldwell, he asserted that it was handed to him in payment of a loan from him to Caldwell. He attempted to prove an alibi, but the evidence fell far short of sustaining it, for his witness in that behalf stated that while he was playing cards with Sears, the latter left the place and was gone for a short time, and that the next time the witness saw him he was in the custody of the arresting officers. We find no inconsistency or discrepancy of any consequence in the testimony of any of the Government witnesses. Moreover, whether they were telling the truth was a question solely for the trial court. Their demeanor, the reasonableness of

their stories, and all other circumstances bearing upon their credibility were within the exclusive scope of the trial court's functions. We cannot say the evidence did not justify the judgment. *United States* v. *Owen*, 231 F. 2d 831 (CA-7).

Defendant insists that the narcotic evidence was mislaid. We find no basis for the argument, but, even if the exhibit had been lost, the undisputed testimony is that the product seized was analyzed by the chemist who found it to be heroin. However, the evidence discloses that the exhibit was never mislaid or lost. Agent Hazer took the envelope with its contents, dated it, initialled it, locked it in his drawer at the Bureau of Narcotics, where it remained until three days later, November 18, 1952, when he placed it in another envelope and submitted it to the chemist, who broke the seal on the envelope, removed the contents, weighed and analyzed it, and found the substance to be heroin. The chemist then resealed the exhibit in the envelope. Though he did not carry it with him, he testified that the envelope could not have been opened without breaking the seal, and that, when it was taken to court by Agent Christopher, it was still sealed. The latter testified that from the time the chemist gave him the exhibit, it remained in his possession, until September 21, 1955. At that time, the trial having been postponed, he returned it to the chemist who, on the same day, resealed it in another envelope, which was returned sealed to the court on December 19, 1956, and opened in court during the trial, when the narcotics were removed therefrom. The evidence is clear that the envelope was traced from the time it was received by the officers and preserved intact until the trial.

Defendant argues that photographs of the various scenes in the locality where the events in evidence occurred are inconsistent with the testimony of the Government's witnesses. However, the record discloses that these photographs were taken during the Christmas holiday season when the streets were crowded, and that they were murky

and blurred. We cannot say that the court was not entirely justified in giving to them only such credence and weight as it believed they were entitled to.

Defendant insists that the trial court should not have permitted the finding to stand because it is founded on the testimony of the informer Caldwell. However, this witness testified merely to the fact that he was given the marked money by the agents; when asked to give details of what occurred later, he refused to answer on the ground that to do so would incriminate him. Consequently, there is no basis in fact for claiming that the defendant was convicted upon the testimony of an informer.

Defendant complains because there is no proof that defendant's fingerprints were found on the envelope containing the heroin. The record is undisputed that the envelope was submitted to a fingerprint expert who is now deceased, that what he discovered was solely within his own undisclosed knowledge, and that there was no record of his findings.

Defendant argues that there are various discrepancies in the trial court's findings. However, though the trial judge made oral findings at the conclusion of the trial, his essential findings are fully supported by the evidence.

It is argued that the Government failed to prove that the narcotics did not come from a stamped package. The evidence shows, without dispute, that no tax stamps were on the package taken from Caldwell. Section 2553(a), Title 26, United States Code, upon which Count I of the indictment was founded, provides that the absence of appropriate tax stamps shall be *prima facie* evidence of a violation and the courts rightly have uniformly followed the express provisions of the statute. *Beland* v. *United States*, 100 F. 2d 289 (CA-5), cert. den., 306 U.S. 636; *United States* v. *Pisano*, 193 F. 2d 355 (CA-7).

Defendant asserts further that the Government was bound to prove that there was no Treasury order. How-

ever, none was found, and, in such case, the presumption that none existed controls until the contrary is shown. *Chin Gum* v. *United States*, 149 F. 2 575, 577 (CA-1).

As we are unable to say, as a matter of law, that the evidence does not sustain the verdict, and as we find no error in the trial, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, October 2, 1957

Before
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. John S. Hastings, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Otis Sears, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

12019

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, October 31, 1957.

Before
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. John S. Hastings, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Otis Sears, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

12019

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, denied.